United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 26, 2007

TO : Dorothy L. Moore-Duncan, Regional Director

Region 4

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Racetrack Food Services, Inc. and 347-4040-3333-3333

Casino Food Services, Inc. 530-8018-2550

Case 4-CA-35158

The Region submitted this 8(a)(5) case for advice on whether a single employer of a group of food and beverage employees lawfully refused to bargain with the Union over a new, larger group of employees performing similar work at the same site because the new group was neither a lawful accretion to nor an expansion of the existing bargaining unit.

We agree with the Region that (1) the new, larger group is not an accretion to the existing unit because the two groups experience no employee interchange, have separate day-to-day supervision, and the Board will not accrete a larger group of employees into a smaller unit; (2) the new group is also not a mere expansion of the existing unit, notwithstanding their similar skills and duties, because the two groups lack a sufficient community of interest given the absence of employee interchange and common day-to-day supervision; (3) there is insufficient evidence that the single employer in fact agreed to bargain with the Union in an overall unit of both groups of employees; and (4) the parties' existing bargaining agreement does not apply to the new group of employees.

FACTS

Greenwood Racing, Inc. (Greenwood) has for many years operated a horseracing enterprise at Philadelphia Park (Park) through its subsidiaries Keystone Turf Club, Inc. (Keystone) and Bensalem Racing Association, Inc. (Bensalem). Park customers may watch live and simulcast horseracing and also wager on horseracing through another Greenwood subsidiary, Greenwood Gaming & Entertainment (GG&E).

Since at least the early 1980's, Keystone and Bensalem have contracted with yet another Greenwood subsidiary, Racetrack Food Services, Inc. (Racetrack), to provide Park customers with food and beverage service. From about 1982 until late 2006, Racetrack operated three bars, two

concession stands, and one dining room on the first, second, and third floors of the five-story Park facility.

Racetrack employs approximately 50 food and beverage employees who have been represented by the Union since at least 1982. The parties' most recent bargaining agreement, effective from May 10, 2000 through November 30, 2003, was extended through November 30, 2006. The parties have been bargaining for a successor agreement.

The bargaining agreement defines the "Employer" as Racetrack Food Services, Inc. The recognition clause of the agreement provides that "the Employer" recognizes the Union as the exclusive collective-bargaining representative for "those Employees [sic] of the EMPLOYER [sic] who perform the work that comes within the work jurisdiction of the UNION [sic], i.e., the food and beverage Employees[.]"² (Emphasis added.)

Sometime in 2005, GG&E obtained a license to operate a casino with slot machines at the Park. Greenwood renovated the five-story Park facility to accommodate the casino operation. As a result, the first three floors of the Park are now dedicated to the casino operation, and the fifth floor is dedicated to the racetrack and related food and beverage service. The fourth floor is used for a kitchen that serves the racetrack as well as part of the casino.

The casino started its operations in December 2006. GG&E contracted with Casino Food Services, Inc. (Casino Foods), another Greenwood subsidiary, to provide food and beverage service to casino patrons. The Region has concluded that Racetrack and Casino Foods constitute a single employer. 3

Casino Foods has approximately 200 unrepresented employees working in a broad range of job classifications.⁴

¹ It is unclear whether Racetrack recognized the Union voluntarily or as the result of a Board certification.

 $^{^2}$ The Union's work jurisdiction is apparently defined as the work performed by employees in the job classifications explicitly listed in the contract: bartenders, bus persons, cashiers-counterpersons, cooks (levels 1 - 5), utility persons or dishwashers, wait staff, and commissary helpers.

³ The Region did not submit this issue for advice.

⁴ Classifications include bartenders, bar backs, bus persons, cocktail servers, cooks, counter workers,

Casino Foods operates three bars, concession stands, a steak house restaurant, and buffets on the first and third floors of the Park. Casino Foods also operates a kitchen on the third floor to service the steak house. The fourth floor kitchen which serves Racetrack also provides food for the casino bars, concession stands, and buffets.

Racetrack maintains that the racetrack and casino must be operated separately under Pennsylvania law. Accordingly, each is separately incorporated and has separate accounts, payrolls, and separate managerial hierarchies. Racetrack and Casino Foods also function separately with no interchange between employees who are separately supervised.

Food and beverage employees in both groups appear to have similar skills and perform similar tasks using the same or similar equipment. Employees in both groups also have a fair amount of non-work interaction. However, employees in each group are employed solely by either Racetrack or Casino Foods, work in different areas of the facility, wear different uniforms and name tags, and report to separate supervisors and managers. Employees in each group also must have a specific license, either a racetrack or a casino license, to work in their respective area.

Employees in one group do not work together with one limited exception: employees for both operations work in areas of the fourth floor kitchen. Among these employees, the dishwashing and prep employees work side-by-side. The remainder of fourth floor kitchen employees cook separately, preparing food exclusively for their respective operations. However, on a few occasions when Racetrack cooks were very busy, Casino cooks were ordered to help them out.

In November 2006, before the Casino opened, the Union approached Racetrack about including the Casino Foods employees in the existing Racetrack unit. Racetrack never

dishwashers, food runners, hosts/hostesses, pantry workers, servers, service bar workers, and commissary employees.

⁵ Both groups use the same parking lot, employee entrance, card swipe locations, payroll office, locker rooms, and smoking break area. Both groups obtain supplies from the same commissary area, and unload supplies from the same loading dock.

⁶ While it is possible for an employee to hold both licenses, there is no evidence that any employee does.

agreed to the proposed unit.⁷ In a January 2007 request for bargaining, the Union claimed that Casino Foods employees appeared to be performing Racetrack unit work and therefore might actually be covered by the terms of the expired contract, or otherwise constitute an accretion to the Racetrack unit. The Union demanded that Racetrack discuss and, if appropriate, bargain over all food and beverage employees at the Park. Racetrack stated that it would meet and bargain over Racetrack employees, but that it had no authority to bargain over another employer's employees, i.e., Casino Foods' employees. Racetrack's refusal to bargain with the Union over Casino Foods employees is the basis of this charge.

The Union has not filed a UC petition to clarify the Racetrack unit to include any of the Casino Foods employees. There is no evidence that the Union has attempted to organize Casino Foods employees or otherwise solicited that group's support. The Union has not demanded that Casino Foods bargain over casino food and beverage employees as a separate unit.

ACTION

The Region should dismiss the charge, absent withdrawal, because the Casino Food employees are neither an accretion to nor an expansion of the existing unit, there is insufficient evidence that the single employer in fact agreed to bargain in an overall unit of both groups of employees, and the parties' existing agreement does not apply to Casino Food employees.

I. Casino Foods Employees Are Not an Accretion

The Board uses the term accretion broadly to describe any "addition of employees into a unit without an election." Since the Union's charge would summarily add

⁷ An Employer representative allegedly stated, at a time when Casino had not yet hired any employees, that he would agree to an overall unit that excluded cooks and cocktail waitresses. However, the Union refused to agree to these or any other exclusions from any overall unit. The Employer representative later stated that he would consider including the kitchen staff, but not the cocktail waitresses. There is no evidence of any further discussion or any agreement on the subject.

⁸ Frontier Telephone of Rochester, Inc., 344 NLRB 258, 258
n.3 (2005); AG Communication System Corp., 350 NLRB No. 15,
slip op. at 14 (2007).

the Casino Foods employees to the existing Racetrack unit, we agree with the Region that an accretion analysis is appropriate here.

Since an accretion deprives employees of their statutory right to choose their bargaining representative, the Board has historically followed a very restrictive policy in applying the accretion doctrine. The Board has found an accretion appropriate "only where the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted. "10

In deciding whether to find an accretion, the Board considers many factors including 1) integration of operations, 2) centralized control of management and labor relations, 3) geographic proximity, 4) similarity of terms and conditions of employment, 5) similarity of skills and functions, 6) physical contact among employees, 7) bargaining history, 8) degree of separate daily supervision, and 9) degree of employee interchange. Since most cases have some but not all factors favoring accretion, 11 the Board has identified two "critical" factors needed for an accretion: employee interchange and common day-to-day supervision. We agree with the Region that the Casino Foods employees do not constitute an accretion to the Racetrack employees unit because these employees lack both these "critical" factors.

The evidence clearly establishes that there is no interchange among the two groups of employees. While there is some non-work interaction among the employees, the fifty Racetrack employees and 200 Casino employees do not work together, even temporarily, with a single exception occurring in the fourth floor kitchen. 13 In that one

⁹ See <u>Dean Transportation</u>, 350 NLRB No. 4, slip op. at 12 (2007) citing Frontier Telephone of Rochester, above.

¹⁰ E. I. Dupont de Nemours, Inc., 341 NLRB 607, 608 (2004).

See, e.g., Frontier Telephone, 344 NLRB at 259, citing \underline{E} . I. DuPont, above, 341 NLRB at 608.

Dean Transportation, above, 350 NLRB No. 4, slip op. at 12, citing E. I. DuPont and Frontier Telephone, above.

¹³ Racetrack employees are restricted to the fifth floor, except to get food from the fourth floor kitchen. Casino Foods employees remain on the first and third floors; any food generated by the fourth floor kitchen is brought to

location, four or five dishwashers work together, and Casino cooks apparently have assisted Racetrack cooks on four or five occasions when the Racetrack cooks were very busy. Otherwise, the employees generally view their operations as physically and functionally distinct, and view themselves as part one of two discrete units, each operating in a discrete area with a separate identity. 14 The absence of any employee interchange indicates that an accretion here is inappropriate. 15

Both the Casino Foods and Racetrack operations also have entirely separate day-to-day supervision. With the exception of management at the highest level, i.e., Greenwood, managers and supervisors of each operation control only the employees within their groups. No manager or supervisor of one group has directed or disciplined an employee of another group, nor is there evidence to suggest that any manager or supervisor even possesses such

the casino by kitchen staff. At no time have employees from either group been assigned to the other to cover a personnel shortage, or for any other special circumstance.

- 14 Racetrack employees stated that when the Casino opened, new Casino employees were hired to service Casino customers and that the two sets of employees do not work together. A Racetrack bartender states that on one occasion, he and another Racetrack employee refused a Casino loading dock supervisor's request to pick up liquor for the Casino. The supervisor later apologized for his request.
- 15 See, e.g., Silver Court Nursing Center, 313 NLRB 1141, 1147 (1994) (lack of interchange among groups of employees - regardless of strong similarities in their skills and duties, and proximity of their work areas - precluded accretion). See also <u>Frontier Telephone of Rochester</u>, 344 NLRB at 260 (minimal interchange among groups of employees fell "well short" of what would be necessary to warrant accretion). Casino Aztar, 349 NLRB No. 59 (2007), an initial representation case relied on by the Union, is inapposite. In that case, the Board rejected the union's attempt to represent a unit confined to food and beverage employees, rather than the casino-wide unit the Board found appropriate, because all the employees in the various operations within the casino shared a strong community of interest notwithstanding common supervision. Id., slip op. 5. In that case, unlike here, there was evide $\overline{\text{nc}}$ e of interchange among the employees, and the Board found the casino's operations were completely integrated. Id., slip op. at 3.

authority. This separate day-to-day supervision also indicates that an accretion here is inappropriate. 16

In any event, accretion is completely inappropriate here because the 200 Casino Foods employees substantially outnumber the 50 Racetrack unit employees. It is well settled that the Board will not accrete a larger group into a smaller group, regardless of their community of interest. Even assuming there were an overwhelming community of interest between these employees, the Casino Foods group is approximately four times the size of the Racetrack unit. Accordingly, the Board would find accretion here unlawful. 18

II. Casino Foods Employees Are Not an Expansion of the Racetrack Unit

The Union argues that, because Casino Foods employees perform the same basic functions that historically have been performed by Racetrack unit employees, Casino Food employees constitute an expansion or outgrowth of that unit. 19 However, the Board has found that employees working in new classifications or in a new operation may be included as an expansion of an existing unit only where, among other things, the new employees shared an overwhelming community of interest with the existing unit employees. 20 The Union's expanded unit argument ignores the

¹⁶ See, e.g., <u>Frontier Telephone</u>, above, 344 NLRB at 261 (accretion inappropriate, in part, without common supervision); <u>Silver Court</u>, above, 313 NLRB at 1146 ("slight" common supervision insufficient to warrant accretion).

¹⁷ See, e.g., <u>Carr-Gottstein Foods Co.</u>, 307 NLRB 1318, 1318 (1992) and cases cited there.

¹⁸ See Nott Co., 345 NLRB 23, slip op. at 5 (2005) (accretion inappropriate where groups were of equal size); Superior Protection, Inc., 341 NLRB 267, 267 (2004) (accretion inappropriate where existing unit of 29 employees would have absorbed new group of 42 employees).

¹⁹ See, e.g., Meyer's Café & Konditorei, 282 NLRB 1 (1986). Compare Nott Co., 345 NLRB No. 23, slip op. at 3-5 (2005) (Board rejected General Counsel's "expansion of unit" theory in favor of an accretion analysis to find employer's refusal to bargain over new, larger unit lawful).

Meyer's Café, above, 282 NLRB at 1, fn. 1. But see, e.g., Gitano Distribution Center, 308 NLRB 1172, 1174 (1992) (although employees worked closely, doing "the same"

absence of those critical factors, and thus the absence of an overwhelming community of interest. The lack of an overwhelming community of interest precludes an expansion of the Racetrack unit to include the more numerous Casino Foods employees.

III. The Single Employer Did Not Agree to Bargain in an Overall Unit

The Union asserts that either Greenwood, or the single employer Racetrack/Casino Foods, verbally agreed to bargain with the Union over a unit covering all food and beverage employees. However, the evidence indicates that the parties had only brief preliminary discussions over the possibility of an overall unit but never actually bargained, much less reached an agreement to bargain, in an overall unit. 21 Evidence concerning the parties' successor contract negotiations also does not support the Union's claim. 22 Finally, the Union refers to a June 28, 2006 email, sent to the Union by the single employer's labor relations representative, containing a list of proposed job categories and suggested starting pay rates for the temporary casino facility. However, this e-mail only describes the potential scope of a Casino Foods unit; it does not memorialize any agreement to include Casino employees in the racetrack unit, or any other Park-wide

kind of work", inclusion of the new group of employees within the existing unit was inappropriate where employees lacked sufficient community of interest).

²¹ We also note that in subsequent correspondence between the parties, the Union made no mention of any single employer agreement to bargain over a Park-wide unit, either to confirm such an agreement or to accuse the single employer of reneging on it.

During successor agreement negotiations, a single employer representative linked casino and racetrack operations, but only to the extent that the increased revenue from the casino might enhance the racetrack bargaining agreement. The single employer representative also stated that he would handle labor relations and negotiations for all of the labor unions at the Park, and would handle negotiations for current racetrack contract as well as negotiating for new hires on the casino side. This statement clearly does not amount to bargaining for both groups in the Racetrack unit, nor an agreement to include casino employees into the Racetrack unit.

unit. 23 Therefore, there is insufficient evidence that single employer actual bargained, or agreed to bargain, in a unit comprised of both groups. 24 And, absolutely nothing suggests that the single employer's corporate parent, Greenwood, ever engaged in bargaining communications with the Union regarding a combined unit.

IV. Racetrack Agreement Does Not Apply to Casino Food Employees

The Union argued to Advice that because Casino Foods employees perform the same kind of work as Racetrack unit employees, Casino Food employees necessarily are covered by the Racetrack's recently expired contract. However, the Racetrack agreement recognition clause explicitly restricts its application to employees working for a specific employer, namely Racetrack. Food and beverage employees working in the casino are employed by Casino Foods and therefore beyond the scope of this recognition clause.

The Region's conclusion that Racetrack and Casino Foods constitute a single employer does not warrant a different result. In a single employer context, the collective bargaining obligations of one employer are binding on any nonsignatory single employer enterprise only to the extent the employees of the signatory and nonsignatory comprise a single appropriate bargaining unit.²⁵ We have already determined that Casino Foods employees are not lawfully included in the Racetrack unit.

In sum, the Region should dismiss the charge, absent withdrawal, because the Casino Food employees are neither an accretion to nor an mere expansion of the existing unit, there is insufficient evidence that the single employer agreed to bargain in an overall unit of both groups of

²³ The Union has provided no evidence that would provide a context for this e-mail which long predates the parties' November 2006 successor agreement discussion, i.e. no evidence regarding its genesis or of subsequent communications regarding it. Without more, this e-mail does not establish an employer agreement to bargain in an overall unit.

²⁴ See <u>Oakwood Care Center</u>, 343 NLRB 659, 663 (2004), where the Board held that "combined units of solely and jointly employed employees are multiemployer units and are statutorily permissible only with the parties' consent."

South Prairie Construction Co. v. Operating Engineers (Peter Kiewit Sons' Co.), 425 U.S. 800, 805 (1976).

employees, and the parties' existing bargaining agreement does not apply the new group of employees.

B.J.K.